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Clerk of the
Appellate Courts

IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE

Assigned on Briefs November 29, 2022

IN RE LIBERTY T.

Appeal from the Chancery Court for Hawkins County
No. 2020-AD-19 Douglas T. Jenkins, Chancellor

No. E2022-00307-COA-R3-PT

In this case involving a petition to terminate the mother's parental rights to her child and to allow the petitioners to adopt the child, the trial court determined that one statutory ground for termination had been proven by clear and convincing evidence. However, the trial court further determined that the petitioners had failed to establish clear and convincing evidence that termination of the mother's parental rights was in the child's best interest. The trial court accordingly dismissed the petition and remanded to the juvenile court's protective jurisdiction. The petitioners have appealed the best interest determination, and the mother has raised an issue regarding the statutory ground. We affirm the trial court's finding as to the statutory ground of failure to support. However, having determined that under the facts of this case the trial court erred in applying the statutory best interest factors applicable to the initial termination petition rather than those applicable to the amended petition, we reverse the trial court's best interest finding and remand for reconsideration applying the amended best interest factors contained in Tennessee Code Annotated § 36-1-113(i) (Supp. 2022).

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court
Affirmed in Part, Reversed in Part; Case Remanded**

THOMAS R. FRIERSON, II, J., delivered the opinion of the court, in which D. MICHAEL SWINEY, C.J., and CARMA DENNIS MCGEE, J., joined.

Keith A. Hopson, Kingsport, Tennessee, for the appellants, Julie T. and Timothy T.

Amy Kathleen Skelton, Rogersville, Tennessee, for the appellee, Faith E.

OPINION

I. Factual and Procedural Background

This case focuses on Liberty T., the minor child (“the Child”) of Faith E. (“Mother”) and Andrew T. (“Father”). Mother and Father were never married. The Child was born in Pennsylvania in June 2018, and within a month after her birth, the parents and the Child relocated to Tennessee. Mother testified at trial that Father, the Child, and she initially stayed with Father’s mother, Julie T. (“Grandmother”), and that Mother then stayed for a time with Father’s father, Timothy T. (“Grandfather”). Mother acknowledged during trial that the Child had remained in what Mother referred to as Grandmother’s temporary custody since July 2018. Mother and Father ended their relationship in December 2018. Grandmother and Grandfather (collectively, “Grandparents”) are the petitioners in the instant action. Grandmother testified that at the time of trial, she resided in an apartment in Church Hill, Tennessee, with the Child and Grandparents’ eighteen-year-old daughter, B.T., while Grandfather resided during the week in the same town at a home that Grandparents were in the process of remodeling. Grandmother further testified that Grandparents planned to live together full time in the remodeled home with the Child and B.T. when the home was finished.

On September 20, 2018, the Department of Children’s Services (“DCS”) filed a petition in the Hawkins County Juvenile Court (“juvenile court”), alleging dependency and neglect against the parents and requesting that temporary legal custody of the Child be transferred to Grandmother.¹ DCS averred that in response to a referral alleging that the Child had been exposed to drugs, DCS had investigated the parents in August 2018. DCS alleged that the investigation revealed concerns of domestic violence between the parents and a need for mental health treatment for both parents, specifically as to Mother in response to her statement made to the investigator that she had been diagnosed with bipolar disorder and anxiety. DCS also averred that the parents could not continue residing with Grandmother because they were not on her lease and that during a child and family team meeting, the parents had agreed to allow Grandmother “to assume custody of the child until such time as they could obtain safe and stable housing and work with their service providers.”

Following a hearing during which each of the parents respectively stipulated that the Child was dependent and neglected, the juvenile court entered an order on February 26, 2019, adjudicating the Child dependent and neglected and directing that the Child would remain in Grandmother’s custody and the juvenile court’s protective jurisdiction. The juvenile court further ordered that the parents would be allowed separate supervised visitation with the Child and that each parent would be required to complete the following responsibilities before he or she would become eligible to regain custody of the Child: (1) obtain and maintain stable and safe housing and (2) follow all recommendations stemming from a clinical parenting assessment. Mother subsequently

¹ Documents from the juvenile court proceedings are in the appellate record as exhibits presented during the termination trial and, in some instances, as attachments to pleadings filed in the trial court.

completed a psychological assessment in October 2018, which was presented as an exhibit during the termination trial.

On February 18, 2020, upon an emergency telephone request from the Child's guardian *ad litem* ("GAL"), attorney Deborah A. Yeomans-Barton, the juvenile court entered an *ex parte* order, requiring that Mother's visitation with the Child would occur on Saturdays from 10:00 a.m. to 4:00 p.m., would be supervised, and would be outside the presence of Mother's boyfriend at that time, C.M. The juvenile court also ordered Father's visitation to occur at Grandmother's home under her supervision and at her discretion and ordered both parents "to submit to psychological testing as set up by [DCS]." In the meantime, Mother had given birth to a second daughter, K.M., in March 2020, and upon a petition filed by DCS, the juvenile court entered an order in August 2020, adjudicating K.M. dependent and neglected as to her biological father, C.M. The juvenile court, while directing that K.M. would remain in the court's protective jurisdiction, placed K.M. in the sole custody of Mother and directed that C.M. was to have no contact with K.M.²

On April 23, 2020, Grandparents filed in the Hawkins County Chancery Court ("trial court") a petition for adoption of the Child and petition to terminate Mother's and Father's parental rights to the Child. As to Mother, Grandparents alleged statutory grounds of (1) abandonment through failure to financially support the Child in the four months preceding the filing of the termination petition, pursuant to Tennessee Code Annotated §§ 36-1-113(g)(1) and 36-1-102(1)(A)(i), and (2) failure to manifest an ability and willingness to assume legal and physical custody of the Child pursuant to Tennessee Code Annotated §36-1-113(g)(14). Grandparents also alleged that termination of Mother's and Father's parental rights would be in the best interest of the Child. The trial court subsequently appointed Ms. Yeomans-Barton to continue as the Child's GAL.

Upon Mother's filing of an affidavit of indigency, the trial court appointed counsel to represent her. Mother filed an answer to Grandparents' petition on June 29, 2020, denying that statutory grounds existed to terminate her parental rights and denying that such termination would be in the Child's best interest. As pertinent on appeal, Mother asserted as an affirmative defense that any failure on her part to financially support the Child was not willful. According to Mother's affidavit of indigency, she was employed full-time at a Hardee's restaurant in April 2020. Mother subsequently testified at trial that she was employed at Hardee's from July 2018 through August 2020 and was later employed for a few months at a Love's Travel Stop.

² According to the trial court's findings in its memorandum opinion in the instant action, C.M. was no longer involved with Mother at the time of trial, and testimony indicated that Mother's current paramour, J.P., appeared to be a positive influence in Mother's life.

Grandparents filed a motion to amend their petition and file a supplemental pleading on July 9, 2021. In their “Supplemental Petition to Terminate Parental Rights,” Grandparents, *inter alia*, alleged an additional statutory ground of persistence of the conditions leading to removal of the Child from Mother’s custody pursuant to Tennessee Code Annotated § 36-1-113(g)(3). Although relying on essentially the same factual allegations, Grandparents also amended their contention that termination of Mother’s and Father’s parental rights would be in the best interest of the Child to incorporate the expanded best interest factors contained in the April 2021 amendment to Tennessee Code Annotated § 36-1-113(i). *See* 2021 Tenn. Pub. Acts, Ch. 190 § 1 (S.B. 205). Mother filed an answer to the supplemental petition, denying all substantive allegations. Grandparents then filed an “Amended Petition to Terminate Parental Rights” on August 6, 2021, still alleging the same three statutory grounds and best interest allegations against Mother, and Mother filed an answer to the amended petition.

Following a hearing, the trial court entered an order on September 8, 2021, allowing Grandparents to file their supplemental petition. After subsequent hearings, the trial court entered three separate orders on December 21, 2021, *inter alia*, allowing Grandparents to amend their termination petition, denying three separate oral motions made by Mother to dismiss the termination petition, setting forth a schedule of weekly supervised visitation for Mother with the Child, and setting forth unsupervised holiday visitation for Mother with the Child to occur in a public place.

The trial court conducted a bench trial on January 10, 2022. As noted by the trial court in its final order, the parties clarified at the beginning of trial that Grandparents were pursuing only two statutory grounds against Mother: (1) abandonment through failure to financially support the Child and (2) persistence of the conditions leading to the Child’s removal from Mother’s custody. Father indicated at trial that he would voluntarily surrender his parental rights if Grandparents were successful in their action against Mother. Grandparents called Mother as an adverse witness, and Grandmother and Grandfather each testified. Grandparents also presented testimony from Heather Click, a nurse who had provided in-home support and education to Mother through the East Tennessee Nurse Family Partnership, and Tracy Burke, a Court Appointed Special Advocate (“CASA”) volunteer who had worked on the Child’s case since October 2019.

At the close of Grandparents’ proof, Mother’s counsel moved to dismiss the termination petition against Mother for failure to prove clear and convincing evidence of either statutory ground. After hearing closing arguments, including the GAL’s recommendation that termination of parental rights would not be in the Child’s best interest, the trial court ruled orally from the bench, subsequently incorporating its transcribed ruling into a written order of dismissal.

The trial court entered its initial order of dismissal on February 7, 2022, determining that Grandparents had proven the statutory ground of failure to support by clear and convincing evidence but that they had failed to prove the ground of persistence of conditions by clear and convincing evidence. Applying the statutory best interest factors applicable to the date of the original petition's filing, *see* Tenn. Code Ann. § 36-1-113(i) (Supp. 2020), the court further found that Grandparents had failed to prove by clear and convincing evidence that termination of Mother's parental rights was in the Child's best interest.

In entering an amended order of dismissal on March 2, 2022, the trial court added findings to its analysis of the best interest factors, primarily clarifying how the court had weighed each factor. The trial court directed that Mother's parental rights to the Child "shall remain completely intact," divested itself of further jurisdiction, and remanded the case to the juvenile court as "the court of original jurisdiction." Grandparents timely appealed.

II. Issues Presented

Grandparents present one issue on appeal, which we have restated slightly:

1. Whether the trial court erred by finding that Grandparents had failed to present clear and convincing evidence that termination of Mother's parental rights was in the Child's best interest and thereby erred by declining to terminate Mother's parental rights to the Child.³

Mother presents an additional issue, which we have similarly restated:

2. Whether the trial court erred by finding clear and convincing evidence of the statutory ground that Mother had failed to financially

³ Grandparents have not raised an issue regarding the trial court's finding that they failed to prove the statutory ground of persistence of conditions by clear and convincing evidence. Although our Supreme Court has instructed that this Court "must review the trial court's findings as to each ground for termination and as to whether termination is in the child's best interests, regardless of whether the parent challenges these findings on appeal," *In re Carrington H.*, 483 S.W.3d 507, 525-26 (Tenn. 2016), this Court has not interpreted this instruction "to mean that this Court must also review grounds that the trial court found were not sufficiently proven when the party who sought termination does not challenge that ruling on appeal," *In Re Disnie P.*, No. E2022-00662-COA-R3-PT, 2023 WL 2396557, at *5 (Tenn. Ct. App. Mar. 8, 2023) (quoting *In re C.S.*, No. E2019-01657-COA-R3-PT, 2020 WL 2066247, at *3 (Tenn. Ct. App. Apr. 29, 2020)). Accordingly, we will not review the trial court's findings as to persistence of conditions in this action.

support the Child in the four months preceding the filing of the petition.

III. Standard of Review

In a termination of parental rights case, this Court has a duty to determine “whether the trial court’s findings, made under a clear and convincing standard, are supported by a preponderance of the evidence.” *In re F.R.R., III*, 193 S.W.3d 528, 530 (Tenn. 2006). The trial court’s findings of fact are reviewed *de novo* upon the record, accompanied by a presumption of correctness unless the evidence preponderates against those findings. *See* Tenn. R. App. P. 13(d); *see also In re Carrington H.*, 483 S.W.3d 507, 523-24 (Tenn. 2016); *In re F.R.R., III*, 193 S.W.3d at 530. Questions of law, however, are reviewed *de novo* with no presumption of correctness. *See In re Carrington H.*, 483 S.W.3d at 524 (citing *In re M.L.P.*, 281 S.W.3d 387, 393 (Tenn. 2009)). The trial court’s determinations regarding witness credibility are entitled to great weight on appeal and shall not be disturbed absent clear and convincing evidence to the contrary. *See Jones v. Garrett*, 92 S.W.3d 835, 838 (Tenn. 2002).

“Parents have a fundamental constitutional interest in the care and custody of their children under both the United States and Tennessee constitutions.” *Keisling v. Keisling*, 92 S.W.3d 374, 378 (Tenn. 2002). It is well established, however, that “this right is not absolute and parental rights may be terminated if there is clear and convincing evidence justifying such termination under the applicable statute.” *In re Drinnon*, 776 S.W.2d 96, 97 (Tenn. Ct. App. 1988) (citing *Santosky v. Kramer*, 455 U.S. 745 (1982)). As our Supreme Court has explained:

The parental rights at stake are “far more precious than any property right.” *Santosky [v. Kramer]*, 455 U.S. [745,] 758-59 [(1982)]. Termination of parental rights has the legal effect of reducing the parent to the role of a complete stranger and of “[“]severing forever all legal rights and obligations of the parent or guardian of the child.” Tenn. Code Ann. § 36-1-113(l)(1); *see also Santosky*, 455 U.S. at 759 (recognizing that a decision terminating parental rights is “*final* and irrevocable”). In light of the interests and consequences at stake, parents are constitutionally entitled to “fundamentally fair procedures” in termination proceedings. *Santosky*, 455 U.S. at 754; *see also Lassiter v. Dep’t of Soc. Servs. of Durham Cnty, N.C.*, 452 U.S. 18, 27 (1981) (discussing the due process right of parents to fundamentally fair procedures).

Among the constitutionally mandated “fundamentally fair procedures” is a heightened standard of proof—clear and convincing

evidence. *Santosky*, 455 U.S. at 769. This standard minimizes the risk of unnecessary or erroneous governmental interference with fundamental parental rights. *Id.*; *In re Bernard T.*, 319 S.W.3d 586, 596 (Tenn. 2010). “Clear and convincing evidence enables the fact-finder to form a firm belief or conviction regarding the truth of the facts, and eliminates any serious or substantial doubt about the correctness of these factual findings.” *In re Bernard T.*, 319 S.W.3d at 596 (citations omitted). The clear-and-convincing-evidence standard ensures that the facts are established as highly probable, rather than as simply more probable than not. *In re Audrey S.*, 182 S.W.3d 838, 861 (Tenn. Ct. App. 2005); *In re M.A.R.*, 183 S.W.3d 652, 660 (Tenn. Ct. App. 2005).

* * *

In light of the heightened burden of proof in termination proceedings, however, the reviewing court must make its own determination as to whether the facts, either as found by the trial court or as supported by a preponderance of the evidence, amount to clear and convincing evidence of the elements necessary to terminate parental rights. *In re Bernard T.*, 319 S.W.3d at 596-97.

In re Carrington H., 483 S.W.3d at 522-24. “[P]ersons seeking to terminate [parental] rights must prove all the elements of their case by clear and convincing evidence,” including statutory grounds and the best interest of the child. *See In re Bernard T.*, 319 S.W.3d 586, 596 (Tenn. 2010).

IV. Statutory Ground of Abandonment Through Failure to Support

Tennessee Code Annotated § 36-1-113 (Supp. 2022) lists the statutory requirements for termination of parental rights, providing in relevant part:

- (a) The chancery and circuit courts shall have concurrent jurisdiction with the juvenile court to terminate parental or guardianship rights to a child in a separate proceeding, or as a part of the adoption proceeding by utilizing any grounds for termination of parental or guardianship rights permitted in this part or in title 37, chapter 1, part 1 and title 37, chapter 2, part 4. . . .

* * *

- (c) Termination of parental or guardianship rights must be based upon:

- (1) A finding by the court by clear and convincing evidence that the grounds for termination of parental or guardianship rights have been established; and
- (2) That termination of the parent's or guardian's rights is in the best interests of the child.

The trial court determined that the evidence clearly and convincingly supported a finding of one statutory ground to terminate Mother's parental rights: abandonment through failure to financially support the Child for four months preceding the filing of the termination petition.

Concerning statutory abandonment, Tennessee Code Annotated § 36-1-113(g)(1) provides, as relevant to this action:

- (g) Initiation of termination of parental or guardianship rights may be based upon any of the grounds listed in this subsection (g). The following grounds are cumulative and nonexclusive, so that listing conditions, acts or omissions in one ground does not prevent them from coming within another ground:
 - (1) Abandonment by the parent or guardian, as defined in § 36-1-102, has occurred; . . .

Regarding the definition of abandonment applicable to this ground, Tennessee Code Annotated § 36-1-102(1) (Supp. 2022) defines abandonment in pertinent part as:

- (A)(i) For a period of four (4) consecutive months immediately preceding the filing of a proceeding, pleading, petition, or any amended petition to terminate the parental rights of the parent or parents or the guardian or guardians of the child who is the subject of the petition for termination of parental rights or adoption, that the parent or parents or the guardian or guardians either have failed to visit or have failed to support or have failed to make reasonable payments toward the support of the child; . . .

Mother contends that the trial court erred in finding by clear and convincing evidence that she had abandoned the Child by failing to support her during the four months preceding the termination petition's filing. Although the trial court determined that this statutory ground had been proven by clear and convincing evidence because Mother had "failed to provide any cash payments to [Grandparents] during the relevant

four (4) month window,” the court did not specify the beginning and ending of the determinative time period for this ground.

At the outset, we note that “this Court has held that we should consider the period of time prior to the filing of the original petition, unless the amended petition constitutes a “separate and distinct’ petition from the original[.]” *In re Estrella A.*, No. M2022-00163-COA-R3-PT, 2022 WL 17091958, at *8 (Tenn. Ct. App. Nov. 21, 2022) (quoting *In Re Elijah F.*, No. M2022-00191-COA-R3-PT, 2022 WL 16859543, at *8 (Tenn. Ct. App. Nov. 10, 2022)) (in turn quoting *In re Braelyn S.*, No. E2020-00043-COA-R3-PT, 2020 WL 4200088, at *5 (Tenn. Ct. App. July 22, 2020)). In *Estrella A.*, this Court determined concerning the determinative period for failure to support that “[a]lthough the amended petition did alter the allegations concerning abandonment, it is something of a stretch to suggest that these alterations rendered the amended petition separate and distinct from its predecessor for purposes of this ground.” *In re Estrella A.*, 2022 WL 17091958, at *8. However, the *Estrella A.* Court concluded that because the parties had agreed “that the four-month period prior to the filing of the amended petition [was] the relevant time frame for purposes of this ground” and, importantly, because Mother’s evidence presented to support her defense of a lack of willfulness was focused on this time period, the evidence for this ground should be considered for the time period preceding the amended petition. *Id.* at *7-8. (“Thus, we conclude that, in fairness to Mother and to aid in the expeditious resolution of this appeal, we will consider the evidence she presented on lack of willfulness between [the dates bracketing the four months preceding the filing of the amended petition].”).

In contrast, we are presented with a situation in this case wherein for other reasons to be explored more fully in the upcoming best interest analysis in this Opinion, we must conclude that the amended petition was separate and distinct from the original petition. However, as to this statutory ground, Grandparents’ allegations regarding failure to support remained essentially the same in the amended petition as in the original petition, including an explicit averment that their allegations concerning this ground applied to the four months preceding the original petition’s filing. Throughout the trial transcript, it is clear that the parties were focused on the four months preceding the original petition’s filing when trying this ground. Additionally, on appeal, although the parties do not specify the dates of the relevant time period, they rely on the “relevant four (4) month window,” as the trial court phrased it, preceding the original petition. In particular, Mother cites to her testimony, elicited by her counsel, specifying the time period beginning with “the very end of December 2019” and “leading up to April 23rd.” As in *Estrella A.*, we determine that for purposes of this ground, “in fairness to Mother and to aid in the expeditious resolution of this appeal,” *see id.* at *8, we will consider the evidence presented concerning the determinative period tried by the parties, which in this case was the four months preceding the original petition’s filing on April 23, 2020.

We therefore conclude that the beginning point of the determinative period was December 23, 2019, and the ending point was April 22, 2020, the day before the original termination petition was filed (“Determinative Period”). See *In re Joseph F.*, 492 S.W.3d 690, 702 (Tenn. Ct. App. 2016) (explaining that the applicable four-month statutory period preceding filing of the termination petition “began on March 8, 2011, and concluded on July 7, 2011, the day prior to the filing of the termination petition”) (citing *In re Jacob C.H.*, No. E2013-00587-COA-R3-PT, 2014 WL 689085, at *6 (Tenn. Ct. App. Feb. 20, 2014)). Because we determine that the trial court’s findings regarding “the relevant four (4) month window” for this statutory ground are inclusive of the Determinative Period, we further determine the trial court’s omission of specific beginning and ending dates to be harmless error. See, e.g., *In re Ima D.*, No. M2021-00022-COA-R3-CV, 2021 WL 5441832, at *4 (Tenn. Ct. App. Nov. 22, 2021); *In re Steven W.*, No. M2018-00154-COA-R3-PT, 2018 WL 6264107, at *12 (Tenn. Ct. App. Nov. 28, 2018).

Tennessee Code Annotated § 36-1-102(1)(D) provides the following definition concerning a parent’s failure to support:

For purposes of this subdivision (1), “failed to support” or “failed to make reasonable payments toward such child’s support” means the failure, for a period of four (4) consecutive months, to provide monetary support or the failure to provide more than token payments toward the support of the child. That the parent had only the means or ability to make small payments is not a defense to failure to support if no payments were made during the relevant four-month period[.]

Support is considered “token” when “the support, under the circumstances of the individual case, is insignificant given the parent’s means.” Tenn. Code Ann. § 36-1-102(1)(B). The statute further provides:

For purposes of this subdivision (1), it shall be a defense to abandonment for failure to visit or failure to support that a parent or guardian’s failure to visit or support was not willful. The parent or guardian shall bear the burden of proof that the failure to visit or support was not willful. Such defense must be established by a preponderance of evidence. The absence of willfulness is an affirmative defense pursuant to Rule 8.03 of the Tennessee Rules of Civil Procedure[.]

Tenn. Code Ann. § 36-1-102(1)(I).

In the case at bar, Mother raised lack of willfulness as an affirmative defense in her answer to the termination petition by stating that “any failure to visit or support was not willful” without any further explanation. *See* Tenn. Code Ann. § 36-1-102(1)(I); *In re Nicholas C.*, No. E2019-00165-COA-R3-PT, 2019 WL 3074070, at *13 (Tenn. Ct. App. July 15, 2019) (“Under Tenn. Code Ann. § 36-1-102(1)(I), willfulness is an affirmative defense; thus, the burden is upon [the parent] to establish that his [or her] failure to [visit or support] was not willful.”). Failure to visit or support a child is “willful” when a person is “aware of his or her duty to visit or support, has the capacity to do so, makes no attempt to do so, and has no justifiable excuse for not doing so.” *In re Audrey S.*, 182 S.W.3d 838, 864 (Tenn. Ct. App. 2005). We note that although the record contains no court order directing Mother to pay child support, it is well settled in Tennessee that every parent is presumed to have knowledge of a parent’s duty to support his or her minor children regardless of whether a court order to that effect is in place. *See* Tenn. Code Ann. § 36-1-102(1)(H) (“Every parent who is eighteen (18) years of age or older is presumed to have knowledge of a parent’s legal obligation to support such parent’s child or children[.]”).

At trial and on appeal, Mother’s defense to this ground is, in substance, not one of lack of willfulness but rather one of sufficiency of support. Mother acknowledges that she made no payments of monetary support to Grandparents during the Determinative Period or at any time while the Child was in Grandparents’ care. However, Mother argues that she did not fail to support the Child during the Determinative Period because she provided “in-kind” support “by providing all essential items during her visitation.” *See In re Jayda J.*, No. M2020-01309-COA-R3-PT, 2021 WL 3076770, at *18 (Tenn. Ct. App. July 21, 2021) (“This Court has previously held that support need not be solely monetary, but can include in-kind gifts.” (citing *In re Kaleb N.F.*, No. M2012-00881-COA-R3-PT, 2013 WL 1087561, at *23 (Tenn. Ct. App. Mar. 12, 2013))). The trial court found Mother’s argument unavailing, noting that the court had heard proof of only “a few, very minuscule things” provided to Grandparents by Mother. The court also stated that although Mother’s effort to ensure that her own home was stocked with supplies for the Child was “refreshing to the Court,” it did not find these items to constitute support provided to “the grandparents who actually had custody.” The court thereby found that the “defense attempted was not sustained by the proof.” Upon careful review, we agree with the trial court.

Mother testified that during the Determinative Period, she exercised some unsupervised visitation with the Child and that she had provided the Child at Mother’s home with “her own room, clothes, a bed, diapers, pull ups, cups, bottles, whatever.” Grandmother confirmed through her testimony that Mother had provided items for the Child’s needs, including food, clothing, and diapers, during Mother’s visits with the Child “for the most part.” As to items given to Grandparents, when Mother was

questioned regarding whether she had provided items such as diapers from July 2018 through the petition's filing in April 2020, Mother responded that she "would get diapers, clothes, the stuff the kid needed, rather than give somebody money." However, she acknowledged that she had not sent any items to Grandparents during the Determinative Period, stating, "I had what I had at my house, like they had what they had." Grandmother also testified that during the Determinative Period, Mother had not provided any items to Grandparents, stating that the only items ever sent by Mother to them were an outfit and a pair of booties when the Child was less than one year of age. Grandfather likewise testified that during the Determinative Period, Mother had provided no items to Grandparents for the Child.

In support of her argument regarding in-kind support, Mother relies on this Court's decision in *In re Jayda J.*, 2021 WL 3076770, at *20, wherein this Court reversed the trial court's finding that the mother had willfully failed to support her children upon determining that DCS, as the petitioner, had "failed to meet its burden to demonstrate that the gifts [the mother] provided were token given her means." See *In re Jayda J.*, 2021 WL 3076770, at *18 ("This Court has explicitly held that while the burden to prove a lack of willfulness now falls on the parent under section 36-1-102(1)(A), the burden to prove that support is token remains on DCS as the petitioner." (citing *In re Josiah T.*, No. E2019-00043-COA-R3-PT, 2019 WL 4862197, at *7 (Tenn. Ct. App. Oct. 2, 2019))). We find *In re Jayda J.* to be factually distinguishable from the instant action. In *Jayda J.*, the mother was "often unable to maintain stable employment due to her very real health issues" but nonetheless "provided gifts and other items to the children throughout the custodial episode, including in the four-month period." 2019 WL 4862197, at *17-20. The mother in *Jayda J.* brought these gifts to the psychiatric facility where her visits with one of the children were conducted, *id.* at *17, unlike Mother in the instant action, who supplied her own home with items for the Child. Additionally, in the case at bar, Mother was employed throughout the Determinative Period and yet sent no monetary payments or in-kind support to Grandparents.

Mother also relies on this Court's decision in *In re Kaleb N.F.*, No. M2012-00881-COA-R3-PT, 2013 WL 1087561, at *22 (Tenn. Ct. App. Mar. 12, 2013), which, as Mother acknowledges, was decided under a prior version of the statute requiring the petitioner to carry the burden of establishing willfulness as an element of abandonment through failure to visit or support. In *Kaleb N.F.*, this Court reversed the trial court's finding of abandonment through failure to support upon determining that the willfulness of the mother's "fail[ure] to make payments toward the support" of the child had not been established by clear and convincing evidence. *Id.* In so determining, this Court considered all of the circumstances, including that (1) the mother had limited or no employment during the relevant four-month period; (2) she had, on the suggestion of a DCS family services worker, "established a practice of giving Foster Mother in-kind

support for [the child], in the form of items for [the child] brought to her visits”; and (3) the foster parents had not requested monetary support and had “rebuff[ed]” the mother’s “inquiry about specific items needed.” *Id.* at *23. A key distinction between *Kaleb N.F.* and the instant action is again that the mother in *Kaleb N.F.* provided items for the child to the foster parents rather than claiming that items in her own home constituted in-kind support as Mother does here.

Mother presents no authority, and our research has revealed none, to support the proposition that items she procured for her own home, rather than provided to the Child’s custodian, should be considered as support for the Child. For this reason, we determine that Mother made no payments, either monetary or in-kind, for the Child’s support during the Determinative Period. Moreover, we determine that the trial court correctly addressed the substance of Mother’s defense as one of sufficiency of support through the items provided in her own home rather than a true lack-of-willfulness defense. At trial and on appeal, Mother has neither argued that she was unable to provide any support whatsoever during the Determinative Period nor claimed to have provided any type of support to Grandparents. *See* Tenn. Code Ann. § 36-1-102(1)(D) (“That the parent had only the means or ability to make small payments is not a defense to failure to support if no payments were made during the relevant four-month period[.]”). We therefore affirm the trial court’s determination that Grandparents proved the statutory ground of abandonment by failure to support by clear and convincing evidence.

V. Best Interest of the Child

When a parent has been found to be unfit by establishment of at least one statutory ground for termination of parental rights, as here, the interests of parent and child diverge, and the focus shifts to what is in the child’s best interest. *In re Audrey S.*, 182 S.W.3d at 877; *see also In re Carrington H.*, 483 S.W.3d at 523 (“The best interests analysis is separate from and subsequent to the determination that there is clear and convincing evidence of grounds for termination.” (quoting *In re Angela E.*, 303 S.W.3d 240, 254 (Tenn. 2010))). Tennessee Code Annotated § 36-1-113(i) provides a list of factors the trial court is to consider when determining if termination of parental rights is in a child’s best interest. This list is not exhaustive, and the statute does not require the court to find the existence of every factor before concluding that termination is in a child’s best interest. *See In re Carrington H.*, 483 S.W.3d at 523; *In re Audrey S.*, 182 S.W.3d at 878 (“The relevancy and weight to be given each factor depends on the unique facts of each case.”). Furthermore, the best interest of a child must be determined from the child’s perspective and not the parent’s. *White v. Moody*, 171 S.W.3d 187, 194 (Tenn. Ct. App. 2004).

As a preliminary matter, we address the version of the statutory best interest factors applicable to this action. In the trial court’s memorandum opinion, incorporated by reference into the amended dismissal order, the chancellor stated that he had “been provided the old factors because I think those are the ones I am to use in this particular case.” None of the parties raised an objection to the trial court’s application of the nine statutory factors that existed in the version of the statute applicable when the original petition was filed in April 2020, and no issue has been raised to this effect on appeal. *See* Tenn. Code Ann. § 36-1-113(i) (Supp. 2020). However, in their amended petition, Grandparents did allege that termination of Mother’s parental rights would be in the Child’s best interest according to the twenty best interest factors contained in the version of the statute that became effective in April 2021, prior to the August 2021 filing date of Grandparents’ amended petition.⁴ *See* Tenn. Code Ann. § 36-1-113(i) (Supp. 2022). In holding that the amended statutory best interest factors should be considered when a termination petition has been filed on or after the effective date of the amendment, this Court has explained, “the statute as amended adds a number of ‘additional factors that should be considered, if relevant.’” *In re Alessa H.*, No. M2021-01403-COA-R3-PT, 2022 WL 3332653, at *14 (Tenn. Ct. App. Aug. 12, 2022) ((quoting *In re Riley S.*, No. M2020-01602-COA-R3-PT, 2022 WL 128482, at *14 n.10 (Tenn. Ct. App. Jan. 14, 2022)).

Whether the amended version of the statute is applicable here depends upon whether the amended petition was a “separate and distinct petition” from the original. *See In re Ava M.*, No. E2019-01675-COA-R3-PT, 2020 WL 2560932, at *14 (Tenn. Ct. App. May 20, 2020) (quoting *In re P.G.*, No. M2017-02291-COA-R3-PT, 2018 WL 3954327, at *7 (Tenn. Ct. App. Aug. 17, 2018)). This Court has recently determined that an amended petition was separate and distinct from the original when “[p]etitioners included grounds for termination only in the amended petition.” *In re Piper N.*, No. W2021-01185-COA-R3-PT, 2023 WL 334656, at *8, *11 (Tenn. Ct. App. Jan. 20, 2023) (ultimately reversing or vacating the trial court’s findings on all grounds and vacating the trial court’s best interest analysis upon remand for sufficient findings of fact and conclusions of law). This Court has also recently determined that “the statutes in effect at the time the second amended petition was filed” must be applied when no statutory grounds for termination were included in the original petition and the first amended petition, although including statutory grounds, contained critical errors in the naming of the parents and child, ultimately corrected only in the second amended petition. *In Re*

⁴ Although Grandparents also filed a “supplemental” petition in July 2021, given that their “amended” petition, filed approximately one month later, contained essentially the same allegations as the petition labeled “supplemental” and was filed within the same timeframe for the applicable statutory amendment, we refer here solely to the effect of the “amended” petition.

Disnie P., No. E2022-00662-COA-R3-PT, 2023 WL 2396557, at *4 (Tenn. Ct. App. Mar. 8, 2023).

In this case, as we noted in the previous section of this Opinion, Grandparents' allegations regarding Mother's failure to support the Child, including identification of the Determinative Period of four months preceding the original petition's filing, remained consistent between the original and amended petitions. However, in their amended petition, Grandparents raised an additional ground of persistence of conditions, and, importantly, they refashioned their allegations concerning the Child's best interest according to the twenty factors contained in the amended version of the statute applicable when the amended petition was filed. We therefore conclude that the amended petition was a separate and distinct petition from the original petition. Thus, the applicable best interest factors were those contained in the amended version of the statute, rather than the prior version applied by the trial court.

In *Disnie P.*, this Court, *inter alia*, reversed the trial court's finding as to the best interest analysis and remanded for reconsideration utilizing the new best interest factors. *Id.* at *14 (citing *In re Alessa H.*, 2022 WL 3332653, at *14). We conclude that we must do the same here. Accordingly, we reverse the trial court's finding that termination of Mother's parental rights was not in the Child's best interest and remand for reconsideration of the Child's best interest employing the following best interest factors, as provided in Tennessee Code Annotated § 36-1-113(i) (Supp. 2022):

- (A) The effect a termination of parental rights will have on the child's critical need for stability and continuity of placement throughout the child's minority;
- (B) The effect a change of caretakers and physical environment is likely to have on the child's emotional, psychological, and medical condition;
- (C) Whether the parent has demonstrated continuity and stability in meeting the child's basic material, educational, housing, and safety needs;
- (D) Whether the parent and child have a secure and healthy parental attachment, and if not, whether there is a reasonable expectation that the parent can create such attachment;

- (E) Whether the parent has maintained regular visitation or other contact with the child and used the visitation or other contact to cultivate a positive relationship with the child;
- (F) Whether the child is fearful of living in the parent's home;
- (G) Whether the parent, parent's home, or others in the parent's household trigger or exacerbate the child's experience of trauma or post-traumatic symptoms;
- (H) Whether the child has created a healthy parental attachment with another person or persons in the absence of the parent;
- (I) Whether the child has emotionally significant relationships with persons other than parents and caregivers, including biological or foster siblings, and the likely impact of various available outcomes on these relationships and the child's access to information about the child's heritage;
- (J) Whether the parent has demonstrated such a lasting adjustment of circumstances, conduct, or conditions to make it safe and beneficial for the child to be in the home of the parent, including consideration of whether there is criminal activity in the home or by the parent, or the use of alcohol, controlled substances, or controlled substance analogues which may render the parent unable to consistently care for the child in a safe and stable manner;
- (K) Whether the parent has taken advantage of available programs, services, or community resources to assist in making a lasting adjustment of circumstances, conduct, or conditions;
- (L) Whether the department has made reasonable efforts to assist the parent in making a lasting adjustment in cases where the child is in the custody of the department;
- (M) Whether the parent has demonstrated a sense of urgency in establishing paternity of the child, seeking custody of the child, or addressing the circumstance, conduct, or conditions that made an award of custody unsafe and not in the child's best interest;

- (N) Whether the parent, or other person residing with or frequenting the home of the parent, has shown brutality or physical, sexual, emotional, or psychological abuse or neglect toward the child or any other child or adult;
- (O) Whether the parent has ever provided safe and stable care for the child or any other child;
- (P) Whether the parent has demonstrated an understanding of the basic and specific needs required for the child to thrive;
- (Q) Whether the parent has demonstrated the ability and commitment to creating and maintaining a home that meets the child's basic and specific needs and in which the child can thrive;
- (R) Whether the physical environment of the parent's home is healthy and safe for the child;
- (S) Whether the parent has consistently provided more than token financial support for the child; and
- (T) Whether the mental or emotional fitness of the parent would be detrimental to the child or prevent the parent from consistently and effectively providing safe and stable care and supervision of the child.

The statute further provides: "When considering the factors set forth in subdivision (i)(1), the prompt and permanent placement of the child in a safe environment is presumed to be in the child's best interest." Tenn. Code Ann. § 36-1-113(g)(i)(2).

In remanding for reconsideration of the best interest analysis, we recognize that "time has marched on during this litigation." See *In re Disnie P.*, 2023 WL 2396557, at *14 (quoting *In re Alessa H.*, 2022 WL 3332653, at *14). At its discretion, the trial court may therefore consider additional evidence on remand. See *In re Disnie P.*, 2023 WL 2396557, at *14.

VI. Conclusion

For the foregoing reasons, we affirm the trial court's finding as to the statutory ground of failure to support. However, we reverse the trial court's finding that termination of Mother's parental rights was not in the best interest of the Child and

remand for reconsideration applying the amended best interest factors contained in Tennessee Code Annotated § 36-1-113(i) (Supp. 2022). This case is remanded to the trial court, pursuant to applicable law, for further proceedings consistent with this Opinion and collection of costs below. Costs on appeal are assessed one-half to the appellants, Julie T. and Timothy T, and one-half to the appellee, Faith E.

s/ Thomas R. Frierson, II
THOMAS R. FRIERSON, II, JUDGE